



PENCE/KELLY CONSTRUCTION, INC.

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Portland (503) 224-8681 Fax (503) 585-7477
CCB # 63435

RECEIVED
JUL 28 2000

MARION COUNTY
BOARD OF COMMISSIONERS Date: 7/25/00

Letter of Transmittal

No. 02060

To: Billy Wasson
Marion County
3150 Lancaster Dr. NE

Phone: 503-589-3257

Fax: 503-373-4430

Salem, OR 97305

Project: Courthouse Square - 99006

Subject: Const Cont P/K Mar Co/S

Project Manager: Dave Hays

SUBMITTED FOR:

Approval	
Your Use	✓
As Requested	
Review and Comment	

ACTION TAKEN:

Approved as Submitted	
Approved as Noted	
Returned for Corrections	
Resubmit	

WE ARE SENDING YOU

☒ Attached

☐ Under Separate Cover Via:

the following items:

☐ Shop Drawings

☐ Prints

☐ Samples

☐ Specifications

☒ Copy of Letter

☐ Plans

☐ Other:

☐ Due

☐ Change Order

Copies	Date	Description
1	7/25/00	Const Contract P/K and Mar Co/Sal Transit

Remarks:

Copies: Transit, file

RECEIVED
AUG 03 2000

MARION COUNTY SUPPORT
SERVICES DEPARTMENT

Signed: _____

John Gremmels

AMENDMENT NO. _____

CONSTRUCTION CONTRACT BETWEEN
PENCE/KELLY CONSTRUCTION, INC. AND
MARION COUNTY AND SALEM AREA MASS TRANSIT DISTRICT

Date: 7/20/00

Marion County and Salem Area Mass Transit District (Owner) and Pence/Kelly Construction, Inc. (Contractor) are parties to a contract dated February 17, 1999, for construction of a project known as Courthouse Square. The parties desire to change the terms of the construction contract concerning processing and payment for change orders and retainage. The parties also desire to add terms to the contract concerning value engineering change proposals.

In consideration of the mutual promises of the parties set forth in this Amendment the parties agree to modify the construction contract as follows:

I. Change Orders:

A. Definitions. For purposes of changes in the work under Article 7, the following definitions of terms shall apply:

1. Direct Costs. Unless otherwise provided in the Contract Documents, Direct Costs shall be limited to the following: cost of materials, including sales tax and cost of delivery; cost of labor, including social security, old age and unemployment insurance, and fringe benefits required by agreement; workers' compensation insurance; bond premiums; rental value of equipment and machinery; and additional costs of field personnel directly attributable to the change.
2. Overhead. The following items shall be included in Contractor's markup (general and administrative expense, overhead and profit) and shall not be charged as direct cost of the Work: Personnel above the level of foreman (i.e., superintendents and project managers); expenses of Contractor's offices including personnel; and overhead and general and administrative expenses.

B. Changed Work Markup. Contractor and Owner agree that the percentage markup to cover all other charges in connection with the Contractor's price for changed work under Paragraph 7.3.7.3 of the General Conditions of the construction contract is hereby amended to be five percent (5%), and to delete ten percent (10%).

II. Value Engineering Change Proposals:

A. General. The Contractor is encouraged to develop, prepare, and submit value engineering change proposals (VECP's) voluntarily. The Contractor shall share in any instant contract savings realized from accepted VECP's submitted on or after May 11, 1999, in accordance with paragraph 6 below.

B. Definitions.

1. Contractor's development and implementation costs, as used in this clause, means those costs the Contractor incurs on a VECP specifically in developing, testing, preparing, and submitting the VECP, as well as those costs the Contractor incurs to make the contractual changes required by Owner acceptance of a VECP.
2. Owner costs, as used in this clause, means those owner costs that result directly from developing and implementing the VECP, such as additional expense for architectural and engineering services, and any net increases in the cost of testing, operations, maintenance, and logistic support. The term does not include the normal administrative costs of processing the VECP.
3. Instant contract savings, as used in this clause, means the estimated reduction in Contractor cost of performance resulting from acceptance of the VECP, minus allowable Contractor's development and implementation costs.
4. Value engineering change proposal (VECP) means a proposal that:
 - (a) Requires a change to this, the instant contract, to implement; and
 - (b) Results in reducing the contract price or estimated cost, provided that the VECP does not involve a change—(i) In deliverable end item quantities only, or (ii) To the contract type only. Owner has a concern that a VECP be of equal or better quality than the original bid specifications. In making a VECP, Contractor will represent and warrant that it has provided Owner with all material information necessary to enable Owner to evaluate the essential functions or characteristics of a VECP such as, without limitation, utility, functionality, safety, service life, reliability, economy of operation, ease of maintenance, and necessary standardized features and appearance.

C. VECP preparation. As a minimum, the Contractor shall include in each VECP the information described in subparagraphs 1 through 7 below. The VECP shall include the following:

1. A description of the difference between the existing contract requirement

and that proposed, the comparative advantages and disadvantages of each, a justification when an item's function or characteristics are being altered, and the effect of the change on the end item's performance.

2. A list and analysis of the contract requirements that must be changed if the VECP is accepted, including any suggested specification revisions.
 3. A separate, detailed cost estimate for (i) the affected portions of the existing contract requirement and (ii) the VECP. The cost reduction associated with the VECP shall take into account the Contractor's allowable development and implementation costs.
 4. A description and estimate of costs the Owner may incur in implementing the VECP, such as test and evaluation and operating and support costs.
 5. A prediction of any effects the proposed change would have on collateral costs to the agency.
 6. A statement of the time by which a contract modification accepting the VECP must be issued in order to achieve the maximum cost reduction, noting any effect on the contract completion time or delivery schedule.
 7. Identification of any previous submissions of the VECP, including the dates submitted, the agencies and contract numbers involved, and previous Owner actions, if known.
- D. Submission. The Contractor shall submit VECP's to the project manager's representative at the worksite, with a copy to the Owner.
- E. Owner action.
1. The Owner shall notify the Contractor of the status of the VECP within the time specified in the VECP or as mutually agreed between the parties. If additional time is required, the Owner shall notify the contractor within the specified or agreed time period and provide the reason for the delay and the expected date of the decision. The Owner will process VECP's expeditiously; however, it shall not be liable for any delay in acting upon a VECP.
 2. If the VECP is not accepted, the Owner shall notify the Contractor in writing, explaining the reasons for rejection. The Contractor may withdraw any VECP, in whole or in part, at any time before it is accepted by the Owner. The Owner may require that the Contractor provide written notification before undertaking significant expenditures for VECP effort.

3. Any VECP may be accepted, in whole or in part, by the Owner's award of a modification to this contract citing this clause. The Owner may accept the VECP, even though an agreement on price reduction has not been reached, by issuing the Contractor a notice to proceed with the change. Until a notice to proceed is issued or a contract modification applies a VECP to this contract, the Contractor shall perform in accordance with the existing contract. The Owner's decision to accept or reject all or part of any VECP shall be final and not subject to the Disputes clause or otherwise subject to litigation or claims under this Contract or applicable law, including without limitation under the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

F. Sharing.

1. Rates. The Owner's share of savings is determined by subtracting Owner costs from instant contract savings and multiplying the result by 60 percent. The Contractor's share of savings is determined by subtracting Owner costs from instant contract savings and multiplying the result by 40 percent.
2. Payment. Payment of any share due the Contractor for use of a VECP on this contract shall be authorized by a modification to this contract to-- (i) Accept the VECP; (ii) Reduce the contract price or estimated cost by the amount of instant contract savings; and (iii) Provide the Contractor's share of savings by adding the Contractor's share of savings to the contract price or fee.

- G. Data. The Contractor may restrict the Owner's right to use any part of a VECP or the supporting data by marking the following legend on the affected parts:

"These data, furnished under the Value Engineering--Construction clause of contract _____, shall not be disclosed outside the Owner agencies or duplicated, used, or disclosed, in whole or in part, for any purpose other than to evaluate a value engineering change proposal submitted under the clause. This restriction does not limit the Owner's right to use information contained in these data if it has been obtained or is otherwise available from the Contractor or from another source without limitations."

If a VECP is accepted, the Contractor hereby grants the Owner unlimited rights in the VECP and supporting data, except that, with respect to data qualifying and submitted as limited rights technical data, the Owner shall have the rights specified in the contract modification implementing the VECP and shall appropriately mark the data. (The terms unlimited rights and limited rights are defined in part 27 of the Federal Acquisition Regulation.)

III. Retainage

- A. The Contractor has requested that the Owner accept securities in lieu of retainage under terms of the construction contract, pursuant to ORS 279.420(3).
- B. The parties have agreed to terms of a Security Agreement which would make this substitution possible. Upon execution of the Security Agreement by both parties, the Owner will cease withholding cash retainage under the construction contract so long as there is no default by Contractor under the construction contract or the Security Agreement. In the event Contractor defaults under the construction contract or the Security Agreement, Owner may immediately, in addition to any other rights or remedies under the Security Agreement, commence withholding retainage as provided in the construction contract and ORS 279.420(1)(a).

OWNER

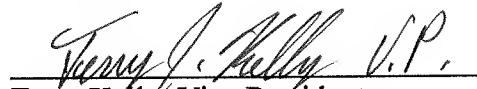


Billy F. Wasson, Project Manager
Marion County, Oregon



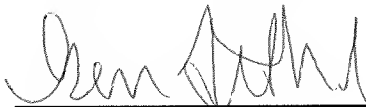
John Whittington, Project Manager
Salem Area Mass Transit District

CONTRACTOR

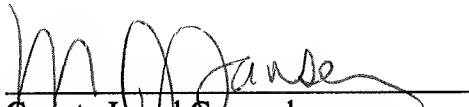


Terry Kelly, Vice President

APPROVED AS TO FORM:



Transit Legal Counsel



County Legal Counsel

 8/7/00

County Contracts Coordinator

From: Mike Hansen
To: PEGGY MITCHELL
Date: Sat, Aug 5, 2000 11:50 AM
Subject: Re: Fwd: Contract Amendment

Peggy,

Let's begin with a little background. On May 21, 1999, I received from Billy a proposal by Pence/Kelly for an amendment to the contract on contractor mark ups. I consulted with the transit district's attorney. I responded that the proposed change order pricing terms were an amendment to the general construction contract. This was not pursued. However, changes were also proposed in the terms of direct costs and overhead for change orders. These were pursued.

On April 1, 1999, I had received a request from Billy to consider a value engineering amendment proposed by Pence/Kelly.

I proceeded to work with transit to arrive at a form of amendment to the contract acceptable to the owners. It addressed, change order terms for direct costs and overhead and markup, value engineering, and implementation of a previously agreed upon Security Agreement to substitute securities for cash retainage.

Billy had consulted on May 11, 1999, with the board members (old board), on this and received an okay to proceed with negotiations.

On July 30, 1999, I provided a final draft of the amendment to Billy that was agreed upon by transit and the county. The draft was for presentation to Pence/Kelly. I advised Billy that I had not consulted the BOC or the County Administrator about the amendment. I left it to Billy to consult.

Billy and John proceeded with negotiations with Pence/Kelly. On September 13, 1999, I made final revisions to gave Billy the revised amendment. I left it to Billy to process this amendment.

On December 28, 1999, I e-mailed you asking for a conformed copy of the amendment, which I assumed had been processed. You did not have one. I inquired of Billy where the amendment might be. Billy replied December 29, 1999, that the amendment was still being negotiated.

On May 15, 2000, I got three copies from John Whittington. I approved them as to form, as did Ben Fetherston. I transmitted them to Billy for processing "through the county contract system." At this time, it had not been signed by anyone else. Billy indicates that he sent them on to transit on May 17, 2000.

That is the history I have.

The general construction contract was executed in the same manner as the signature blocks for the amendment you have on March 9, 1999. The Intergovernmental Development Agreement between transit and the county authorizes the project coordinators to execute the general construction contract and review and approve change orders. Page 11, section 4.5 (iii) and (iv). I believe Billy and John have the authority to execute this agreement.

Under the general construction contract, modifications include written amendments signed by the parties, change orders, and construction change directives. Section 1.1.1. In this case, the written amendment comes after the change orders, which were done based on the agreed changes. I don't know when Pence/Kelly executed the agreement, but the county and transit had agreed to the amendments when Billy and John had signed.

Even though the paperwork is tardy and out of order, and this makes it difficult to track the amendment

and change orders, the proper written documents have been executed, they exist, and are sufficient to contemporaneously support the payments made to the contractor. I can also say the amendment was negotiated and reviewed thoroughly by both legal counsels. The amendment is acceptable as to form, and it is consistent with the IDA and the FTA requirements.

The substance of the amendment is okay. I think you can be comfortable signing it, unless you see terms with which you disagree.

The processing of this amendment was sloppy. You were left out of the loop. Frankly, I feel like apologizing to you, but I think this process is an issue for Billy. This long reply is just a "no harm, no foul" explanation. The process is important. It is our protection against "harm". It gives us timely review from several perspectives. That gives us assurance that our agreements are consistent with county rules and state laws. That gives us assurance that we are operating legally as we carry out our contracts. That gives us assurance that our rights are protected as we carry out our contracts.

I'm not going to carry contracts for the departments and persons responsible to do so. However, I will update you on each matter I am now working on for courthouse square. There are a number of agreements in the works. This week, I'll provide you with a list and status report. You and I have been coordinating better on most courthouse square agreements. Hopefully, this won't happen again.

>>> PEGGY MITCHELL 08/04 8:45 AM >>>

What are your thoughts on this response from Billy. I received one copy of an amendment to Pence Kelly contract dated 7/20/00. It has been signed by county (Billy & you), transit (John & Ben) and Pence Kelly. There was a space for contracts coordinator, but I hadn't signed. Evidentially it was sent to PK back in May and they just found it and sent it on to Billy.

Thanks,
Peg